(26)

Supreme Court of the United States

October Term, 1943.

No. 511

W. T. BECKHAM, Clerk, United States District Court, Western District of Kentucky, - - - Petitioner,

versus

PRENTISS M. BROWN, Administrator, Office of Price Administration, - - - - - - - Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

AND

BRIEF FOR THE PETITIONER.

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No.

W. T. BECKHAM, CLERK, UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY, - - - - - - *Petitioner,*

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, - *Respondent.*

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v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION, - *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

AND

BRIEF FOR THE PETITIONER.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, W. T. Beckham, Clerk of the United States District Court for the Western District of Kentucky, prays that a writ of certiorari issue to review the judgment entered on August 31, 1943 (Record, p. 75), in the United States Circuit Court of Appeals for the Sixth Circuit.

OPINIONS BELOW.

The opinion of the United States District Court for the Western District of Kentucky, dated June 14, 1943 (Record, p. 68), is reported in 50 Fed. Supp. 313.

The opinion of the United States Circuit Court of Appeals for the Sixth Circuit, dated August 31, 1943 (Record, p. 76), is reported in 137 Fed. (2d) 644.

JURISDICTION.

Jurisdiction is conferred on this Court to review this cause by writ of certiorari by Section 240a of the Judicial Code (28 U. S. C. A., §347).

SUMMARY STATEMENT.

On May 27, 1943, Prentiss M. Brown, as Administrator of the Office of Price Administration, filed a complaint in the United States District Court for the Western District of Kentucky (No. 584) against Cummins Distilleries Corporation, its officers, directors and stockholders (1) to recover $6,799,101.57 as treble damages for selling whiskey in violation of the maximum price regulation issued under the Emergency Price Control Act and further asking (2) for a general order of attachment against the property of all the defendants therein. A copy of this complaint is found on pages 3 to 12 of the Transcript of Record. The Clerk of said Court (W. T. Beckham, petitioner herein)

refused to issue an order of attachment in Action 584 because the Administrator had not furnished the attachment bond and security required by Section 198 of the Civil Code of Kentucky.

Thereupon Prentiss M. Brown, as Administrator, instituted the present action (No. 586 in said District Court) against W. T. Beckham, as Clerk, asking that an order be entered requiring the Clerk to issue an order of attachment in prior action 584 without the execution of an attachment bond by the Administrator.

The defendant Clerk filed a motion to dismiss the complaint (Record, p. 19), and certain of the defendants in prior action No. 584 also intervened and joined the Clerk in asking such dismissal (Record, p. 19-65). When the lower court sustained the petitioner's motion to dismiss, the Administrator declined to plead further and his complaint was dismissed by the District Court (Record, p. 65). The Administrator appealed to the Circuit Court of Appeals for the Sixth Circuit and that Court reversed the District Court (Record, p. 75).

QUESTION PRESENTED.

Is an officer of the United States entitled to an order of attachment without executing the bond required by State statute? The Circuit Court of Appeals, in reversing the District Court, answered this question in the affirmative.

REASONS RELIED ON FOR ALLOWANCE OF WRIT OF CERTIORARI.

The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

The effect of the decision of the Circuit Court of Appeals is to authorize any administrative agency of the United States to obtain the remedy of attachment against defendants in a civil action without requiring the execution of a bond or other security as required by State law. The action in which the attachment was sought was not brought by the United States, or by any department thereof, but merely by the head of an administrative agency, *i. e.,* Office of Price Administration. The Circuit Court of Appeals incorrectly interpreted that part of Rule 64 of the Federal Rules of Civil Procedure, which expressly provides that remedies permitting the seizure of person or property to secure satisfaction of a judgment are available in accordance with the local law unless there is some existing statute of the United States which governs such procedure.

The Circuit Court of Appeals determined that 28 U. S. C. A., §870, created such an exception and, therefore, Rule 64 was inapplicable. The Court held that Section 870 was so clear on its face that the Court would not be justified in examining the original of that section or its historical background or even the title of the Act. The Court was clearly in error in refusing to make any real study of Section 870 in order to deter-

mine its true meaning, and the Court erroneously assumed that its decision was controlled by *United States* v. *Bryant,* 111 U. S. 499, 4 S. Ct. 601, 28 L. Ed. 496.

Accordingly, the Circuit Court of Appeals erred in reversing the decision of the District Court. It further erred in holding that 28 U. S. C. A., §870, exempts respondent as an administrative officer from furnishing the attachment bond required by Section 198 of the Civil Code of Kentucky.

ARGUMENT.

The Federal Rules of Civil Procedure, which became effective September 16, 1938, clearly provide that all remedies for the seizure of property, for the purpose of securing the satisfaction of the judgment sought, are available under the circumstances and *in the manner* provided by the State law.

Rule 64 reads as follows:

> "At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state

> court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action."

This rule superseded 28 U. S. C. A., §726, which theretofore authorized attachments as provided by State laws.

The State law applicable in this case is Section 198 of Carroll's Kentucky Civil Code, which reads as follows:

> "§198. Bond to be Executed Before Issual; Form of. The order of attachment shall not be issued by the clerk, until a bond has been executed in his office by one or more sufficient sureties of the plaintiff to the effect that the plaintiff pay to the defendant all damages which he may sustain by reason of the attachment, if the order be wrongfully obtained, not exceeding double the amount of the plaintiff's claim."

The Circuit Court of Appeals holds that the provisions of Section 198 are not applicable to a plaintiff, who is an officer of the United States, because Rule 64 provides that "any existing statute of the United States governs to the extent to which it is applicable," and further holds that 28 U. S. C. A., §870, is not superseded by the rules and that it exempts an officer of the United States from furnishing the attachment bond

required of all plaintiffs by Section 198 of the Civil Code of Kentucky.

The error of this holding is apparent from the language of 28 U. S. C. A., §§869 and 870, which sections read as follows:

"869. BOND IN FORMER ERROR AND ON APPEAL. —Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid."

NOTES R. S., §1000 from Act Sept. 24, 1789, c. 20, §22, 1 Stat. 84; Dec. 12, 1794, c. 3, 1 Stat. 404; Feb. 21, 1863, c. 50, 12 Stat. 657; July 27, 1868, c. 255, §1, 15 Stat. 226.

"870. SAME; NOT REQUIRED OF UNITED STATES. Whenever an appeal, or other process in law, admiralty, or equity, issues from or is brought up to the Supreme Court, or a district court, either by the United States or by direction of any department of the government or any corporation all the stock of which is beneficially owned by the United States, either directly or indirectly, no bond, obligation, or security shall be required from the United States, or from any party acting under the direction aforesaid, either to prosecute said suit, or to answer in damages or costs. In case of an adverse decision, such costs as by law are tax-

able against the United States, or against the party acting by direction as aforesaid, shall be paid out of the contingent fund of the department under whose directions the proceedings were instituted."

NOTE: R. S., §1001 from Act Feb. 21, 1863, c. 50, 12 Stat. 657; July 27, 1868, c. 255, §1, 15 Stat. 226; Mar. 3, 1911, c. 231, §§117, 289, 36 Stat. 1131, 1167; Jan. 31, 1928, c. 14, §1, 45 Stat. 54; June 19, 1934, c. 653, §7, 48 Stat. 1109.

Section 869 was adopted in 1789, amended in 1794, and some authorities show that it was supplemented in 1863 by the adoption of the provisions now contained in Section 870, which is from the Act of February 21, 1863, c. 50, 12 Stat. 657, reading as follows:

"Ch. L: An Act to allow the United States to prosecute appeals and writs of error without giving security.

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That, whenever any writ of error, appeal or other process in law, admiralty or equity shall issue from or be brought up to the Supreme Court of the United States either by the United States or by direction of any department of the government thereof, no bond, obligation, or security shall be required from the United States, or from any party acting under the direction aforesaid, by any judge or clerk of court, either to prosecute said suit or to answer in damages or costs. In case of an adverse decision, such costs as by law are taxable against the United States shall be paid out of the contingent fund of the department un-

der whose direction the proceedings shall have been instituted. All Acts and parts of Acts in conflict herewith are hereby repealed.

"Approved February 21, 1863."

In 1868 Congress extended Section 870 to include the "Circuit Courts of the United States." In 1911 Congress created the Circuit Court of Appeals, abolished the Circuit courts and transferred their powers to the District courts. In 1928 writs of error were abolished and appeal substituted therefor. In 1934 Section 870 was amended by writing immediately after the word "Government" the following: "or any corporation all the stock of which is beneficially owned by the United States either directly or indirectly."

The Revised Statutes of the United States, second edition, 1878, passed at the First Session of the 43d Congress, 1873-74, provide:

"Procedure on error and appeal."

Under this heading we find Section 1000 (Code, §869) and also Section 1001 (Code, §870).

The Code of Laws of the United States of America of a General and Permanent Character in Force December 7, 1925, and Appendix with Laws to December 6, 1926, entitled "Consolidated, Modified, Set Forth and Published in 1926 in the 150th Year of the Republic at its First Session by the 69th Congress," read, in part, as follows:

"PROCEDURE ON ERROR AND APPEAL.

"§869. BOND IN ERROR AND ON APPEAL.—Every justice or judge signing a citation on any writ of error, shall, except in cases brought up by the United States or by direction of any department of the Government, take good and sufficient security that the plaintiff in error or the appellant shall prosecute his writ or appeal to effect, and, if he fail to make his plea good, shall answer all damages and costs, where the writ is a supersedeas and stays execution, or all costs only where it is not a supersedeas as aforesaid. (R. S., §1000.)"

"§870. SAME; NOT REQUIRED OF UNITED STATES. —Whenever a writ of error, appeal, or other process in law, admiralty, or equity, issues or is brought up to the Supreme Court, or a circuit court of appeals, either by the United States or by direction of any department of the Government, no bond, obligation, or security shall be required from the United States, or from any party acting under the direction aforesaid, either to prosecute said suit, or to answer in damages or costs. In case of an adverse decision, such costs as by law are taxable against the United States, or against the party acting by direction as aforesaid, shall be paid out of the contingent fund of the department under whose directions the proceedings were instituted. (R. S., §1001; Mar. 3, 1911, c. 231, §§118, 289, 36 Stat. 1131, 1167.)"

The United States Code, 1940 edition, like the earlier edition, has Sections 869 and 870 in the subdivision entitled, "Procedure on Appeal."

Under the title, "Procedure on Appeal," Congress has clearly provided:

§869: For supersedeas bonds and cost bonds by appellants.

§870: "Same; not required of United States." This is consistent with what Congress said it was doing when this section was entitled, "An Act to allow the United States to prosecute appeals and writs of error without giving security."

In view of the clear and unambiguous language of these sections, we doubt that the Circuit Court would have held that Section 870, by implication, exempts all officers of the United States from furnishing the attachment bond required of all plaintiffs by Section 198 of the Civil Code of Kentucky, were it not for the erroneous decision by the District Court for the District of Columbia in 1879 in *United States* v. *Ottman,* 3 MacArthur 73, and language found in *United States* v. *Bryant* (1884), 111 U. S. 499, 4 S. Ct. 601, 28 L. Ed. 496.

United States v. *Bryant* was an action at law in the Circuit Court of the United States for the Southern District of Alabama by the United States against Henry Bryant and J. V. Weckley to recover the possession of 2,740 pine logs. An order of seizure was issued by the Clerk and the Marshal seized 858 logs. On defendants' motion the Court dissolved the order of seizure and directed the Marshal to restore the property seized. A jury found the plaintiff entitled to 500 logs, worth $150, and judgment was entered in the alternative. Plaintiff moved to set aside the order dis-

solving the seizure, which was overruled, and plaintiff sought a writ of error. This Court, in reversing the lower court, said:

> "This is not the case of an attachment against the property of a defendant, under Section 915 of the Revised Statutes, but is a case where, under Section 914, the forms and modes of proceedings are to conform, 'as near as may be,' to the forms and modes of proceedings existing at the time, in a like cause, in the courts of record of Alabama."

In the *Bryant* Case the Court found the affidavit to be sufficient and held that the Conformity Act did not make it necessary that the United States execute the bond required by the Statutes of Alabama in a replevin suit because of the provisions of Section 1001 of the Revised Statutes. Regardless of the correctness of that decision, it does not hold that the United States may, by attachment, take the property of a defendant without furnishing bond. Even before the new rules, the State laws authorizing attachments were controlling in the Federal courts. 28 U. S. C. A., §726. However, before the new rules we often did not have conformity under the Conformity Act (28 U. S. C. A., §724), because that Act did not require conformity as did 28 U. S. C. A., §726, but only conformity "as near as may be" desired by the Federal Court. This, of course, caused the agitation which resulted in the adoption of the new rules.

The new Rules govern "procedure in the district courts of the United States" and they supersede all

earlier Federal statutes and decisions in conflict therewith. From the language of the rules and notes it clearly appears that this Court did not intend to exempt the United States or officers thereof from furnishing an attachment bond. No such provision is found in Rule 64 and the notes to that Rule make no reference to 28 U. S. C. A., §870. Our contention that Section 870 deals only with supersedeas and costs bonds is borne out by the following provisions from the rules and notes:

> RULE 62(e): "STAY IN FAVOR OF THE UNITED STATES OR AGENCY THEREOF. When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant."
>
> "Note to Subdivision (e). This states the substance of U. S. C. A., Title 28, §870 (Bond; not required of the United States.)"

"RULE 72. APPEAL FROM A DISTRICT COURT TO THE SUPREME COURT. When an appeal is permitted by law from a district court to the Supreme Court of the United States, an appeal shall be taken by petition for appeal accompanied by an assignment of errors. The appeal shall be allowed, a citation issued, a jurisdictional statement filed, a bond on appeal and a supersedeas bond taken, and the record on appeal made and certified as prescribed by law and the Rules of the Supreme

Court of the United States governing such an appeal."

Note: "§869 (Bond in error and on appeal).
§870 (Same; not required of United States)."

"RULE 73. APPEAL TO A CIRCUIT COURT OF APPEALS."

"(c) BOND ON APPEAL. Whenever a bond for costs on appeal is required by law, the bond shall be filed with the notice of appeal. The bond shall be in the sum of two hundred and fifty dollars, unless the court fixes a different amount or unless a supersedeas bond is filed, in which event no separate bond on appeal is required. The bond on appeal shall have sufficient surety and shall be conditioned to secure the payment of costs if the appeal is dismissed or the judgment affirmed, or of such costs as the appellate court may award if the judgment is modified. If a bond on appeal in the sum of two hundred and fifty dollars is given, no approval thereof is necessary. After a bond on appeal is filed an appellee may raise objections to the form of the bond or to the sufficiency of the surety for determination by the clerk."

"(d) SUPERSEDEAS BOND. Whenever an appellant entitled thereto desires a stay on appeal, he may present to the court for its approval a supersedeas bond which shall have such surety or sureties as the court requires. The bond shall be conditioned for the satisfaction of the judgment in full together with costs, interest, and damages for delay, if for any reason the appeal is dismissed or if the judgment is affirmed, and to satisfy in full such modification of the judgment and such costs,

interest, and damages as the appellate court may adjudge and award. When the judgment is for the recovery of money not otherwise secured, the amount of the bond shall be fixed at such sum as will cover the whole amount of the judgment remaining unsatisfied, costs on the appeal, interest, and damages for delay, unless the court after notice and hearing and for good cause shown fixes a different amount or orders security other than the bond. When the judgment determines the disposition of the property in controversy as in real actions, replevin, and actions to foreclose mortgages or when such property is in the custody of the marshal or when the proceeds of such property or a bond for its value is in the custody or control of the court, the amount of the supersedeas bond shall be fixed at such sum only as will secure the amount recovered for the use and detention of the property, the costs of the action, cost on appeal, interest, and damages for delay."

"NOTE TO SUBDIVISION (c). The first sentence leaves unaffected the bond provisions of U S. C., Title 28, §§832 (Suits, and so forth, by poor persons; prepayment of fees and costs), 869 (Bond in error and on appeal), 870 (Bond in error and on appeal; not required of United States)."

The Emergency Price Control Act of 1942 (50 U. S. C. A., Appendix, §925), in authorizing the Administrator to institute certain actions, provides as follows:

"(a) Whenever in the judgment of the Administrator any person has engaged or is about to engage in any acts or practices which constitute or will constitute a violation of any provision of sec-

tion 4 of this Act (Section 904 of this Appendix), he may make application to the appropriate court for an order enjoining such acts or practices, or for an order enforcing compliance with such provision, and upon a showing by the Administrator that such person has engaged or is about to engage in any such acts or practices a permanent or temporary injunction, restraining order, or other order, shall be granted without bond."

"(e) If any person selling a commodity violates a regulation, order or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may bring an action either for $50 or for treble the amount by which the consideration exceeded the applicable maximum price, whichever is the greater, plus reasonable attorneys' fees, and costs as determined by the court. For the purposes of this section the payment or receipt of rent for defense-area housing accommodations shall be deemed the buying or selling of a commodity, as the case may be. If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer is not entitled to bring suit or action under this subsection, the Administrator may bring such action under this subsection on behalf of the United States. Any suit, or action, under this subsection may be brought in any court of competent jurisdiction, and shall be instituted within one year after delivery is completed or rent is paid. The provisions of this subsection shall not take effect until after the expiration of six months from the date of enactment of this Act."

Action No. 584 was brought under authority of Subsection (e) which contains no provision for attachment without bond. Suits under this subsection may be brought in the appropriate State Court as well as in the Federal Court, and it seems important to note the State decisions which hold that 28 U. S. C. A., §870, even as misconstrued in the *Ottman* Case, does not apply to proceedings in State courts. *Bryan* v. *Payne* (Tex. C. A.), 232 S. W. 362; *United States* v. *Branson* (Tex. C. A.), 147 S. W. (2d) 286. If these decisions are correct, and if this Court should fail to reverse the decision of the Circuit Court of Appeals herein, the Administrator can secure an attachment without bond in the Federal courts, but he cannot secure an attachment in the State courts without giving bond. Surely Congress did not so intend, and if it had intended to relieve the Administrator from furnishing bonds in actions brought under Subsection (e), it would have so provided, as it did with reference to injunctions in Subsection (a) of the same section.

It must be conceded that, unless the Administrator is required to give a bond, the defendants will be without remedy for damages sustained by reason of the attachment, if the order is wrongfully obtained. In our opinion, it should not be presumed that Congress ever intended such a result. In Section 870, Congress undertook to provide an effective remedy and the courts have held that the exemption does not apply unless it appears that the costs can be paid from a fund available for that purpose.

In *Platt* v. *Adriarie* (C. C.), 90 Fed. 772, the Court said:

> "Congress has provided that, in certain actions which are brought under federal statutes, no security for costs shall be given; but it was not so disregardful of the rights of the individual citizen as to deprive him of his right to costs in the event of his success."

The opinion of the District Judge, in dealing with this aspect of the question, reads as follows:

> "The practical situation existing in this case emphasizes the need for treating alike all plaintiffs seeking the provisional remedy of an attachment, whether they be individuals, corporations or Government agencies. An attachment before judgment is usually a speedy and effective proceeding, but is fully justified where the plaintiff has a valid cause of action. It is often severe in its effect upon the defendant and for this reason should be carefully used. Its use is not justified when the plaintiff has no case. It should be used only to protect a plaintiff in the collection of any judgment which he will ultimately obtain. It is for those reasons that state statutes require the execution by the plaintiff of an indemnifying bond to protect the defendant in the event of the attachment being improperly used. The damage to a defendant when an attachment is improperly used is just as great in the case of its improper use by a Government agency as it is in the case of its improper use by an individual or a private corporation. Insofar as the protection of the defendant is concerned, which is the fundamental purpose of requiring an at-

tachment bond, it makes no difference who is the plaintiff. In the present case an attachment for approximately $7,000,000.00 would tie up and freeze every bank account of every defendant in the suit. Since no defendant would probably be able to execute a counter-bond in that amount to release the attachment, such assets would continue frozen for the duration of the suit. Many of the defendants are actively engaged in important businesses in Louisville, the nature of which requires the continuing existence of banking accounts and banking credit. It is claimed by many of these defendants, and it is probably the fact, that the issuance of the attachment would completely ruin their businesses. This is a fact which would ordinarily have no legal consideration, since the defendants would be protected by the plaintiff's bond if the attachment was improper. But in the present case it is a practical matter that has considerable weight in considering the problem presented. The defendants contend that the action can not be successfully maintained against them in that the specific price regulation which they are charged with violating was not in effect until after the sales complained of were made. This issue may accordingly be one which could turn in favor of either the plaintiff or the defendants. Even if the defendants successfully maintain their position many of them would nevertheless be ruined by the improper use of the attachment without the recourse which the law attempts to provide for defendants in attachment suits generally."

Undoubtedly, our many Federal officers and agencies should not have the right to take property from

citizens by the extraordinary remedy of attachment without furnishing the affidavit and bond required by statute. Yet opposing counsel demand an order of attachment in Action No. 584 upon a complaint, verified, not by the Administrator, but by one of his local attorneys, and they argue that Congress intended to exempt the United States and all of its officers from executing an attachment bond by the provisions of Section 870. That Congress did not so intend is demonstrated by the original title, "An Act to allow the United States to prosecute appeals and writs of error without giving security," and clearly the section was intended only to relieve the United States and its officers from executing bond "either to prosecute said suit or to answer in damages" for failure to prosecute an appeal "or costs." It is submitted that the language of this section does not entitle the United States or its officers to an attachment without bond. Certainly, a contrary intention does not so clearly appear as to justify the Circuit Court of Appeals in refusing to consider the original title or heading which Congress gave to this section. In our opinion, it is significant that no such exemption is found in Rule 64, which provides that attachments "are available under the circumstances and in the manner provided by the law of the State."

CONCLUSION.

It is earnestly insisted that "an order of attachment" should "not be issued by the Clerk until a bond has been executed" by the Administrator, as required by Section 198 of the Civil Code of Kentucky.

For the foregoing reasons it is respectfully submitted that this petition presents a most important question of federal law which should be settled by this Court and that a writ of certiorari should be granted.

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CITATIONS

565435—43

In the Supreme Court of the United States

OCTOBER TERM, 1943

No. 511

W. T. BECKHAM, CLERK, UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF KENTUCKY, PETITIONER

v.

PRENTISS M. BROWN, ADMINISTRATOR, OFFICE OF PRICE ADMINISTRATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States District Court for the Western District of Kentucky (R. 68–74), is reported in 50 F. Supp. 313. The opinion of the Circuit Court of Appeals (R. 76–80) is reported in 137 F. (2d) 644.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 31, 1943 (R. 75–76). The petition for a writ of certiorari was filed in this

Court on November 27, 1943. Jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925 (28 U. S. C. Sec. 347 (a)).

QUESTION PRESENTED

Is an officer of the United States entitled to an order of attachment without executing the bond required by State statute?

RULE AND STATUTES INVOLVED

Rule 64 of the Federal Rules of Civil Procedure:

> At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought, subject to the following qualifications: (1) any existing statute of the United States governs to the extent to which it is applicable; (2) the action in which any of the foregoing remedies is used shall be commenced and prosecuted or, if removed from a state court, shall be prosecuted after removal, pursuant to these rules. The remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or

equivalent remedies, however designated and regardless of whether by state procedure the remedy is ancillary to an action or must be obtained by an independent action.

Section 198 of Carroll's Kentucky Civil Code:

> § 198. BOND TO BE EXECUTED BEFORE ISSUAL; FORM OF. The order of attachment shall not be issued by the clerk, until a bond has been executed in his office by one or more sufficient sureties of the plaintiff to the effect that the plaintiff pay to the defendant all damages which he may sustain by reason of the attachment, if the order be wrongfully obtained, not exceeding double the amount of the plaintiff's claim.

Section 1001 of the Revised Statutes (28 U. S. C. 870):

> Whenever an appeal, or other process in law, admiralty, or equity, issues from or is brought up to the Supreme Court, or a district court, either by the United States or by direction of any department of the Government or any corporation all the stock of which is beneficially owned by the United States, either directly or indirectly, no bond, obligation, or security shall be required from the United States, or from any party acting under the direction aforesaid, either to prosecute said suit, or to answer in damages or costs. In case of an adverse decision, such costs as by law are

taxable against the United States, or against the party acting by direction as aforesaid, shall be paid out of the contingent fund of the department under whose directions the proceedings were instituted.

STATEMENT

On May 27, 1943, the Price Administrator of the Office of Price Administration, filed a complaint in the United States District Court for the Western District of Kentucky against Cummins Distilleries Corporation, its officers, directors and stockholders (1) to recover $6,799,101.57 as treble damages for selling whiskey in violation of the maximum price regulation issued under the Emergency Price Control Act and further asking (2) for a general order of attachment against the property of all the defendants therein. (R. 3–12.) The Clerk of court (W. T. Beckham, petitioner herein) refused to issue an order of attachment because the Administrator had not furnished the attachment bond and security required by Section 198 of the Civil Code of Kentucky. It is not disputed that the Administrator was entitled to the attachment if he was not required to give the bond required by the Kentucky statute.

Thereupon the Administrator instituted the present action against W. T. Beckham, as Clerk, asking that an order be entered requiring the Clerk to issue an order of attachment in the prin-

cipal action without the execution of an attachment bond by the Administrator.

The defendant Clerk filed a motion to dismiss the complaint (R. 19) and certain of the defendants in the principal action also intervened and joined the Clerk in asking such dismissal (R. 19–65).

The District Court sustained the petitioner's motion to dismiss; the Administrator declined to plead further; and his complaint was accordingly dismissed (R. 65–66). The Circuit Court of Appeals thereupon reversed the District Court (R. 75–76).

ARGUMENT

The decision of the Circuit Court of Appeals is correct; there is no conflict; and there is no occasion for further review.

All of the reported decisions including one by this Court are in accord with the decision below in holding that Section 1001 of the Revised Statutes (28 U. S. Code 870) relieves the United States and its agencies of the necessity of furnishing a bond as a condition to obtaining a writ of attachment or other ancillary process in the federal courts, although the state statutes expressly require the giving of a bond. *United States* v. *Bryant,* 111 U. S. 499; *United States* v. *Kinney,* 264 Fed. 542, 544 (E. D. Pa.); *United States* v. *Ottman,* 3 MacArthur (App. D. C.) 73; *United States* v. *Pacific Forwarding Co.,* 8 F.

Supp. 647 (W. D. Wash.); *The Eastern Shore,* 31 F. Supp. 964 (D. Md.).

That Section 1001 of the Revised Statutes (28 U. S. C. 870) exempts the United States, its officers and agencies from the requirement of furnishing a bond as a condition to obtaining attachments and other provisional remedies, is confirmed by the fact that in 1934 Congress amended the statute without making any change indicative of a disapproval of the prior construction placed upon the section. The 1934 amendment extended the benefits of the section to Government corporations, without making any other change in the section. In these circumstances the amendment of the section may be regarded as a Congressional approval of the prior construction placed upon it. Cf. *Johnson* v. *Manhattan Ry. Co.,* 289 U. S. 479, 500; *Heald* v. *District of Columbia,* 254 U. S. 20, 23.

The adoption of the Federal Rules of Civil Procedure did not work any change in the law. Rule 64 adopts the state law, subject to the express qualification: "any existing statute of the United States governs to the extent to which it is applicable." Section 1001 of the Revised Statutes is an existing statute which has not been repealed. Neither the Rules themselves nor the enabling Act in pursuance of which they were adopted repeal the Section.

Repeals by implication are not favored, especially where the rights of the sovereign are

affected, and where two statutory enactments can possibly stand together, both should be given effect. In *United States* v. *McIntosh,* 57 F. (2d) 573 (E. D. Va.), it was contended that Section 870 of Title 28 (Section 1001, R. S.) of the United States Code was repealed by implication by a later Act, now Section 382, Title 28. In rejecting this contention, the court said (p. 580):

> It seems clear, therefore, that section 870 of title 28 exempts the government from giving bond for the injunction in this case, unless it has been impliedly repealed by the later act of 1914, now section 382 of title 28, and the defendant contends for the implied repeal. But the act of 1914 does not expressly repeal the prior act, and it is a familiar rule of statutory construction that repeals by implication are not favored, and, where two statutory enactments can stand together, both should be given effect. Bearing in mind that the United States is sovereign, and that it has the undoubted right, subject only to self-imposed statutory restrictions, to resort to its own courts for relief in proper cases, it is, in my opinion, unreasonable to infer an intention on the part of Congress in the later general act of 1914 to impliedly repeal the earlier act, which seems to indicate a general policy not to burden the sovereign government with the obligation of giving bond in proceedings in its own courts. See *United States* v. *Herron,* 20

> Wall. 251, 22 L. Ed. 275; *Guarantee Title Co.* v. *Title Guaranty Co.*, 224 U. S. 152, 32 S. Ct. 457, 56 L. Ed. 706.

The Advisory Committee which prepared the rules has recognized the continued existence of Section 1001 of the Revised Statutes. See the notes of the Advisory Committee to Rules 54 (d), 72 and 73 (c). Furthermore, the Advisory Committee's notes to Rule 64 show that no change in the law was intended. In its notes to Rule 64 the Advisory Committee said:

> This rule adopts the existing federal law, except that it specifies the applicable state law to be that of the time when the remedy is sought. Under U. S. C., Title 28, Sec. 726 (Attachments as provided by state laws) the plaintiff was entitled to remedies by attachment or other process which were on June 1, 1872, provided by the applicable state law, and the district courts might, from time to time, by general rules, adopt such state laws as might be in force. This statute is superseded as are district court rules which are rendered unnecessary by the rule.

It is clear from the foregoing that the Rule was intended to effect but a single change, namely, to adopt by reference the state laws in force when the remedy is sought, rather than the state laws in effect on June 1, 1872. No other change was intended. In all other respects it was intended that the law should remain as it stood before the adoption of the Rule.

Nor can any implication be drawn from the provisions of Section 205 of the Emergency Price Control Act of 1942 that the Administrator should not be entitled to the exemption provided for by Section 1001 of the Revised Statutes. (See Pet. 15–16.) It is true that Section 205 (a) of the Act provides for the issuance of temporary restraining orders and preliminary injunctions at the suit of the Administrator without furnishing a bond, and that Section 205 (e) under which the principal action is being prosecuted does not provide for provisional remedies such as garnishment and attachment being made available without a bond. The reason that no provision is made in Section 205 (e) for provisional remedies being made available without bond is plain. That section does not deal with remedies but simply creates a liability. For the remedies available to enforce that liability, reference must be made to the general statutes and rules of court relating to civil practice. Section 205 (a), on the other hand, relates solely to a remedy, namely, the remedy by way of injunction and affirmative orders to enforce compliance. Since the section deals only with a remedy, the section properly prescribes the conditions upon which it is available. One of the conditions so prescribed is that it is to be available without the necessity of furnishing a bond.

Equally without significance is the fact that the action in which the attachment was sought was brought by the Administrator and not by the department of which he is the head. Cf. *Federal Housing Administration* v. *Burr*, 309 U. S. 242.

CONCLUSION

The petition should be denied.

Respectfully submitted.

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